No. 12774, No. 12791, No. 12792, No. 12793,
No. 12798, No. 12799, No. 12800, and No. 12802

UNITED STATES COURT OF APPEALS for the NINTH CIRCUIT

OREGON-WASHINGTON PLYWOOD COMPANY, *Petitioner*,
vs. FEDERAL TRADE COMMISSION, *Respondent*. No. 12774

WHEELER, OSGOOD CO., *Petitioner*,
vs. FEDERAL TRADE COMMISSION, *Respondent*. No. 12791

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vs. FEDERAL TRADE COMMISSION, *Respondent*. No. 12800

M. AND M. WOOD WORKING COMPANY, *Petitioner*,
vs. FEDERAL TRADE COMMISSION, *Respondent*. No. 12802

PETITIONS TO SET ASIDE ORDER OF THE FEDERAL TRADE COMMISSION

REPLY BRIEF OF PETITIONERS: Douglas Fir Plywood Association, Douglas Fir Plywood Information Bureau, Anacortes Veneer, Inc., Associated Plywood Mills, Inc., Elliott Bay Mill Company, Harbor Plywood Corporation, United States Plywood Corporation, Vancouver Plywood & Veneer, Inc., Robinson Plywood and Timber Company, Weyerhaeuser Sales Company, Wallace E. Difford

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STATEMENT OF ISSUES PRESENTED BY RESPONDENT

The second issue stated by respondent at Page 18 of its brief is as follows: "Is the Commission authorized to order the cessation of unfair methods of competition despite the plea of their abandonment?" This submits no issue at all, being entirely incomplete. For

instance: If the abandonment was after issuance of the Complaint, the answer is yes. If the abandonment was shortly before the issuance of the Complaint, the answer is yes.

If the abandonment had existed for a period of six (6) years and eight (8) months, as it had in this case, the answer, we submit, is no.

Issue numbered (4) was not argued in the brief of these petitioners.

ANSWERING ARGUMENT OF RESPONDENT

A. Introductory

Before proceeding to answer the argument of respondent there is some extra-judicial debris in its brief which we wish to clear out of the way.

1. Lack of good faith on the part of these petitioners.

Under the heading "Argument, Introductory Statement," at page 21, respondent opens its Argument with a charge of "possible lack of good faith on petitioners' part." In the next sentence the possible lack of good faith seems to have been converted into a definite lack of good faith, with the charge that we are trying to "wriggle out" of a settlement. We had not heretofore supposed that the action of any American businessman in seeking relief in the courts of this land, as provided by our statutes, would subject him to a reflection upon his integrity.

At page 25 of respondent's brief it is stated that the action of these petitioners in seeking judicial review of this order was a move totally unexpected by the Com-

mission. The English language sometimes is possible of several interpretations but we would have thought that these words contained in the Answers were fairly plain. They are quoted at the top of page 22 of respondent's brief:

> "Any and all admissions of fact made by respondent herein [petitioner here] are made solely for the purpose of this proceeding, the enforcement *or review thereof in the Circuit Court of Appeals,*" etc. (Italics supplied.)

On page 21 of respondent's brief appears this sentence: "The record herein and the Commission's correspondence files—as counsel for petitioners well know—disclose that the entire arrangement represented a compromise and it was never contemplated that the admission answers should not form the basis for an inhibition against the continuation or repetition of petitioners' illegal conduct." We do not propose to follow the respondent in its practice of referring to matters not in this record on review and are not doing so. We do, however, deny absolutely any implications that the answers were filed with the thought that these petitioners would not pursue all further legal remedies and insist that no order of any kind should be entered. What other construction can be placed upon the closing paragraph of the answer, a typical one of which was set forth at pages 5-6 of our brief (R. 59-61). In addition to the reservation of the right of review in the Court of Appeals just above referred to, we reserved "the right of a hearing with oral argument and filing of briefs before the Commission as to what order, *if any,* should be issued upon the facts hereby admit-

ted" (Italics supplied). Nor is there anything in the statute granting the right of review of an order of the Commission (15 U.S.C.A., Section 45(c)) which indicates in any manner that the right of review in the courts is any less present in this type of a proceeding than in a proceeding in which evidence has been taken.

2. References to matters not in the record on appeal.

We need hardly call the court's attention to that part of Rule 19 par. 6 of the Rules of the Ninth Circuit, which, after setting forth the procedure for designating the portions of the record to be printed, states: "and the court will consider nothing but those parts of the record and the points so stated." The following, although not perhaps all-inclusive, is a listing of instances in the respondent's brief of argument based upon matters not in the record in this case.

Page 21—Commission's correspondence files.

Bottom of page 23—reference to the official typewritten transcript of the proceedings before the trial examiner which are not a part of the record.

Top of page 23—references to R. 52 etc. which apparently are references to the Commission's record, for respondent uses the designation Tr. for reference to the record on appeal.

The memorandum proposing disposition set forth as Appendix A to the brief is not part of the record.

Page 24 refers to the above mentioned Appendix.

A.

See page 29 for references to "negotiations," which are not part of the record.

In view of the Rule 6 above referred to, petitioner will not in this reply brief burden the court with any argument in opposition to statements or arguments made by the respondent and based on matters not in the record.

B. Answering Respondent's Argument Under Its Heading on Page 26 of Its Brief A. 1. as Follows:

"A. The Commission correctly found that the capacity, tendency and results of the unlawful acts admitted by petitioners in their several answers to the amended complaint 'have been and now are' to restrain in various ways trade in the plywood industry.

"1. There is nothing in the record to show, or even warrant a reasonable inference, that petitioners have finally abandoned their conspiracy."

It should be kept in mind that the Amended Complaint and the Answers constitute the only record on which the findings of the Commission and its order were based and we wish to point out this portion of the Answer (quoted at page 5 of our brief, see R. 60):

> " * * * answering the amended complaint in this proceeding, state that they admit all of the material allegations of fact set forth in said complaint, provided this admission be taken to mean that the understanding, agreement, combination, conspiracy, and planned common course of action alleged in paragraph seven of the amended complaint existed and continued *only* for a substantial part of the period of time charged in the amended complaint, to-wit, for a substantial part of the period from May, 1935, to August 1, 1941, *and not otherwise, and, except to the extent of such admission, deny all of the material allegations of fact*

set forth in the complaint, * * *." (Italics supplied).

The answers, therefore, admitted that the alleged illegal activity existed "only" during the period ending August 1, 1941, and in order that no doubt could exist as to the scope of this admission, the qualifying words "and not otherwise" were used. These words, of course, are clearly words of exclusion. *Preston v. Herminhaus* (Cal.) 292 Pac. 952, 957. In addition the answers denied that any illegal conduct existed after August 1, 1941.

The record in this case was closed by the trial examiner on September 30, 1949 (R. 90-91) and these cases went to the Commission then on the basis of the Amended Complaint as limited by the scope of the Answers.

Under this branch of respondent's argument it appears to take the position that it can accept the admission part of the answers but reject the denials. They frankly say so at page 28 of their brief in the first sentence of the second complete paragraph. Further, it appears in the same paragraph on page 28 of respondent's brief that our denials were "self-serving." That certainly introduces a new concept in the law of pleading. Hereafter, defendants may no longer deny anything, because that is "self-serving." They may only admit.

Our surprise, we think, must equal any felt by the Commission at the filing of our petitions for review (page 25 of their brief) to find that in a proceeding disposed of on the pleadings, an answer to a complaint

can be divided, those parts favorable to the complainant accepted, and all denials rejected.

The procedure followed in this case of entering an order based upon the complaint as admitted in part and denied in part, is analogous to a motion for judgment on the pleadings.

> "For the purposes of the motion, all well-pleaded material allegations of the opposing parties pleading are to be taken as true and all allegations of the moving parties which have been denied are taken as false." 2 Moore's Federal Practice (2d ed.) page 2269.

Several cases are cited in support of this proposition, among them *Wyman v. Wyman,* 9 Cir., 109 F.2d 473; and *Beal v. Missouri Pa. R. Corp.,* 312 U.S. 45, 61 S.Ct. 418, 85 L.ed 577.

In the latter case, the court said (p. 51, 312 U.S.):

> "It does not appear that any motion was made by the parties for judgment on the pleadings. But the record shows that the trial court entered the decree in respondent's favor on its own motion. Upon such a motion denials and allegations of the answer which are well pleaded must be taken as true."

Again on page 29 of respondent's brief appears this statement:

> "Hence it appeared from petitioners' answers that they had participated in practices flagrantly violative of the Federal Trade Commission Act for about six years. There was nothing to show abandonment."

The respondent is thus changing our answer to read that we admit the violation of a substantial part of

the period between May, 1935, until August 1, 1941, "period," and are ignoring that the admission is qualified "and not otherwise" and that the answer denied all the allegations except as admitted.

On page 29 of its brief, respondent, after referring to matters not in the record on appeal, says that the proceeding was the equivalent of a consent that an order be issued. We find again that our answer has been amended by respondent to eliminate the closing language as follows: "but reserving the right of a hearing with oral argument and filing of briefs before the Commission as to what order, if any, should be issued upon the facts hereby admitted."

In support of their argument that this is an equivalent of a consent order, respondent cites at the bottom of page 29 of their brief the case of *National Candy Co. v. Federal Trade Commission,* 7 Cir., 104 F.2d 999. The case is not in point at all because as appears from the answer set forth in footnote 1, page 1003, of 104 F.2d, there was no reservation of the right to be heard and there was a specific consent to the entry of an order as follows: "that it consents that the Commission, without hearing, without further evidence, and without other intervening procedure, may make, enter, issue and serve upon it, its findings as to the facts and conclusion based thereon, and an order to cease and desist from the methods of competition alleged in the complaint."

C. Answering Respondent's Argument Under the Heading on Page 30 of Its Brief A. 2. as Follows:

"2. By its nature, a conspiracy to restrain trade contemplates continuity of purpose and results, and its effectiveness depends thereon. Hence, in a Federal Trade Commission proceeding brought to 'prevent' unfair methods of competition, continuance of such a conspiracy is properly presumed in the absence of a clear showing of abandonment."

The essence of the argument under this heading up to the bottom of page 34, is that a conspiracy having been admitted as existing for a substantial part of the period of time between 1935 and 1941, it is presumed to continue. Again, the respondent is accepting the admission parts of the answers and ignoring the statement in the answer that it existed only for a substantial part of the period of time between May, 1935, and August 1, 1941 "and not otherwise," with a denial of the allegations that it existed after 1941. The principles of law set forth by the respondent in regard to the presumption of continuance of a conspiracy until the contrary is shown are, of course, well established. In this case the contrary was shown by the terms of the answers. It must be remembered that the amended complaint and the admission answers stand in the place of, or constitute, evidence taken. *Century Metalcraft Corporation v. Federal Trade Commission,* 7 Cir., 112 F.2d 443; *Hill v. Federal Trade Commission,* 5 Cir., 124 F.2d 104; *Kritzik v. Federal Trade Commission,* 7 Cir., 125 F.2d 351.

On pages 37-38 of the respondent's brief there is a reference to the case of *Keasbey & Mattison Co. v. Fed-*

eral Trade Commission, 6 Cir., 159 F.2d 940, with quotes from a contention of the petitioners in that case. The part of it italicized by them refers to the cancellation of the licenses prior to the filing of the complaint and was answered by the court in this manner: "It was not error for the Commission to issue the cease and desist order even though the licenses were cancelled by all but one of the petitioners prior to the institution of the action." This case was referred to at the top of page 6 of Appendix A to our original brief and as we there said, it does not appear how long prior to the filing of the Complaint the licenses had been cancelled.

At page 34 respondent gives this quotation: "Abandonment will not be presumed and, even though pleaded and presently effective, is no bar to the entry of an enforcement order." *Federal Trade Commission v. Wallace,* 75 F.2d 733, 738 (C.A.8, 1938). However, respondent did not quote the sentence which preceded the sentence it quoted and which is as follows: "Respondent says that he ceased his 'admitted activities' at once when this case was filed." This shows, therefore, that there was no abandonment until a proceeding was brought against the individual. Obviously, no one could set up as a defense the fact that he abandoned something illegal only when a proceeding based upon that illegality was started.

On page 38 of respondent's brief they quote from the case of *Vaughan v. John C. Winston Co.,* 10 Cir., 83 F.2d 370, 374 (1936) as follows:

> "If, except for the injunction, Vaughan would have continued to send out defamatory circulars,

> then the order concededly was proper; if he did not so intend, then he is not hurt by the order. *His appeal from that part of the order indicates it hurts; but it can only hurt if he desires to resume his unlawful acts.* (Italics supplied)."

We can see that respondent is very pleased with this quotation and especially the last sentence that has been italicized. What they neglected to give this court are the facts in the case which, incidentally, are quite interesting. Mr. Vaughan, State Superintendent of Public Instruction of the State of Oklahoma, took it upon himself single-handedly to defy the Text Book Commission as well as the Legislature. As the court observes: "By this letter Vaughan, for all practical purposes, repealed the textbook laws of Oklahoma." Anyone who takes the trouble to read the facts of this case can see why no court would have been very kindly disposed towards Mr. Vaughan. However, the important thing here and which, of course, is not shown by the quotation given by the respondent, is that the contumacious conduct of said Mr. Vaughan was continuing unabated and with full enthusiasm up to the very day of the suit. The court says at page 372: "The very day the suit was brought, Vaughan sent out another circular directing the county superintendents to use other texts than those lawfully adopted in making up their book-lists for the coming school year." And again preceding the quotation given by the respondent (excepting intervening citations) is this sentence which states a rule that, of course, is well settled: "Equity may act to avert an impending wrong; it is not divested of power because a defendant suspends his wrongdoing *when he is sued,* or

protests his good intentions for the future." (Italics supplied.)

This case, therefore, falls among those with which, of course, we have no quarrel that discontinuance of conduct after suit is brought or protestations that conduct will not be resumed, which however had continued to the time of the suit is not a defense.

On page 39 respondent gives a quotation from the case of *Standard Container Manufacturers' Assn. v. Federal Trade Commission,* 5 Cir. 119 F.2d 262, 265 (1941):

> "[The contention] that some of the petitioners have gone out of business or have taken bankruptcy may be disposed of *by simply saying that the order is not retrospective, but wholly prospective, in operation and if these petitioners are really out of business to stay they can take no harm from it.*" (Italics supplied.)

Again may we call the attention of this court to the sentence directly following the sentence quoted by the respondent, which we supposed was omitted solely in the interests of shortening the brief:

> "But questions of harm aside, they were in business when the proceeding was properly begun against, and jurisdiction properly obtained over, them; that jurisdiction was not lost by their going out of business or taking bankruptcy; and these facts furnish no ground for setting the order aside."

Again, therefore, here is another case where the facts show that the supposed matters to be set up as a defense occurred after the case had been actually commenced.

The case simply is not authority for the proposition for which it is cited by the respondent.

On page 40 of respondent's brief is set out the following quotation from the case of *National Labor Relations Board v. General Motors Corp.,* 179 F.2d 221, 222 (1950) in support of its argument that discontinuance of unlawful activities before suit is not a defense.

> "It is for the court to say whether the plaintiff shall be compelled to accept his assurance that he will not resume what he should not have begun. After all, no more is involved than whether what the law has already condemned, the court shall forbid; from the fact that its judgment adds to its existing sanctions that of punishment for contempt is not a circumstance to which a court will ordinarily lend a friendly ear."

Respondent neglected to give the court this sentence which precedes that quotation:

> "The defendant in an action for an injunction never as a matter of right becomes entitled to a dismissal because *after process served,* he discontinues the conduct of which the plaintiff complains." (Italics supplied.)

With that sentence supplied the holding of the court becomes quite different from what is claimed by the respondent. As we have said time and time again, we have no quarrel with the rule that discontinuance of illegal activities after a suit has been commenced or after an administrative proceeding has been commenced is not a defense to the issuance of an injunction or a cease and desist order.

On that same page the respondent quotes from the case of *United States v. Aluminum Co. of America,* 148

F.2d 416, 447-448 (C.A.2, 1945). As everyone knows, the facts in that case are extremely complicated. However, in connection with the statement of the court quoted in respondent's brief, we wish to call attention to the fact that that particular statement related to the cartel agreement. And it should be noted that in the preceding column on page 448 of 148 F.2d the court made the following observation in regard to these cartel agreements:

> "It is true that some eighteen months before war was declared the other shareholders ceased to perform the agreement, but no one ever gave the prescribed notice of dissolution and, formally at least, the agreement *continued and still continues.*" (Italics supplied.)

At the bottom of page 34 the respondent asked why these petitioners are opposing the issuance of an order which, as they point out, of itself carries no punitive sanctions, and then says that the only inference that can be made is that we still propose to engage in illegality. If that argument is a valid one, it is equally valid then in every proceeding brought by the Federal Trade Commission under Section 5 of the Federal Trade Commission Act. We would like to counter with a question: Must a person proceeded against under such proceeding fail to defend or be subject to the claim that he must be guilty, otherwise he would submit without any defense?

Respondent points out on page 35 that we were under no compulsion to plead admissions. That is quite correct. Respondent was likewise under no compulsion to accept the admission answers which denied any ille-

gality after 1941 and which stated that we admitted we had been guilty of illegal conduct during a substantial part of the period of time between May, 1935, to August 1, 1941, and not otherwise. The respondent, in the same paragraph on page 35, says that we did not avail ourselves of the right to introduce evidence to show discontinuance. There was no occasion for us to introduce evidence because we had submitted answers which, with the amended complaint, stood in the place of evidence. We might also point out that the Commission did not choose to introduce any evidence, accepted the answers which limited the illegal activity to a period prior to August 1, 1941, and their findings of fact, of course, were made accordingly.

Respondent argues that if abandonment is to be a bar, it must be established as a clearly evidentiary showing. What clearer showing could there be than abandonment which has existed for almost seven years before a proceeding has been brought?

On pages 37-38 of the respondent's brief there is a quotation from the case of *Eugene Dietzgen Co. v. Federal Trade Commission,* 142 F.2d. 321, 330 (C.A.7, 1944); *cert. denied* 323 U.S. 730 (1940). Then at the bottom of page 38 it is stated that the foregoing excerpt is cited in four of the five briefs filed herein for petitioners, and footnote 7 includes the brief of these petitioners. That the foregoing excerpt was cited in our brief at pages 17-18 is correct. Oddly enough, however, the respondent omitted at the end of their first paragraph these sentences which we had included and which are part of the full paragraph in the opinion of the court at page 330. The sentences in ques-

tion are these: "Ordinarily, the Commission should enter no order where none is necessary. This practice should include cases where the unfair practice has been discontinued."

D. Answering Respondent's Argument Under Its Heading on Page 40 of Its Brief B. as Follows:

"B. The commission is authorized to order the cessation of unfair methods of competition regardless of abandonment and regardless of whether such abandonment occurs before or after the issuance of the complaint."

The Federal Trade Commission itself has previously recognized that no Cease and Desist Order should be entered where there has been a substantial interval between the termination of the alleged illegal acts and the issuance of the Complaint. See *Grocery Distributors' Association of Northern California, et al.,* F.T.C. No. 5177, discussed at pages 15 and 16 of our original brief. In that case where only four years had elapsed between the termination of the alleged illegal acts and the issuance of the Complaint, the Commission itself dismissed the action.

The correct rule is also laid down in the cases set forth at pages 16-18 of our brief and we will not burden the court with repetition of them here.

As we indicated in our original brief many cases can be cited in support of the doctrine that discontinuance of the practice in question does not prevent the entry of a cease and desist order, but in order to see what those cases really hold it is necessary to study the facts. There is no question but what discontinuance after a proceeding has been started or after a proceeding has been

threatened or after being subjected by an investigation or even discontinuance which has existed for only a short time, should not bar the entry of a cease and desist order. But we can conceive of no reasonable theory wherein it is in the public interest to forbid practices which have been discontinued almost seven years prior to the institution of a proceeding directed towards those practices.

Most of these cases set forth on page 42 and following relating to Federal Trade Commission proceedings, have been discussed in Appendix A to our original brief and we will not again go into them. In the interest, however, of showing how the facts in each case must be studied, we refer to the quotation from *Perma-Maid Co. v. Federal Trade Commission,* 121 F.2d 282, 284, appearing on page 40 of respondent's brief. There is nothing in that quotation that indicates when the practices had been discontinued. In the preceding paragraph the court says this: "They [the findings] do not show that petitioner made any attempt to prevent the unlawful practices prior to the filing of the complaint on November 20, 1937." The fact is then that there had been no abandonment until the proceeding had been started. Likewise, in the case of *Juvenile Shoe Co. v. Federal Trade Commission,* 289 Fed.57, only one of two practices had ceased and there is nothing in the facts to show when the petitioner in that case had ceased the use of a label which was objectionable.

We will not here discuss the labor cases and price cases which appear at pages 43-44 of respondent's brief. In an Appendix B to this brief, we will analyze the cases which respondent has set out in Appendix C of its brief.

E. Answering Respondent's Argument Under Heading C. on Page 44 as Follows:

"C. The commission properly ordered petitioner Wallace E. Difford to cease and desist from the illegal practices in which he admitted having participated."

At the outset respondent says that our argument that the present business of petitioner Difford, namely, lumber distribution, is wholly unrelated to the functions of the plywood association, is merely a bald assertion lacking support in the record.

(In view of the constant references by respondent to matters outside the record, this charge is somewhat amusing.)

We are content to rest upon the findings of the respondent. In Paragraph 1 (R. 98-99) the nature of the Douglas Fir Plywood Association and its business is set forth. The association is a non-profit corporation organized "for the declared purpose, among other things, of dealing with common industrial problems of management, such as those involved in the production, distribution, employment and financial functions of the plywood industry, and to secure cooperative action in advancing the common purposes of its members, to foster equity in business usages, and to promote activities aimed to enable industry to conduct itself with the greatest economy and efficiency."

Paragraph V of the findings (R. 108) states that Wallace E. Difford was managing director of this association from March 8, 1938, until June 30, 1946, "Said respondent Difford severed his employment with the respondent association as of June 30, 1946 and is pres-

ently engaged in the distribution of lumber products under the name of W. E. Difford & Sons." We submit that the business of the distribution of lumber products is as stated by us in our brief at page 22 "wholly unrelated to the functions of the plywood association" as set forth by the respondent in Paragraph 1 of its findings.

Any further argument under this heading would be repetition of what we said in our original brief and we are content to rest on that.

F. The Argument of Respondent Under Heading D at Page 46 Relates to Briefs Other Than Those Filed by These Petitioners as That Argument Was Not Included In Our Original Brief.

CONCLUSION

In conclusion, the petitioners again urge that from the standpoint of the Federal Trade Commission Act and what it was supposed to accomplish, bearing in mind the long interval between the cessation of any illegal activity and the initiation of proceedings by the respondent, and under the authority of the cases above cited, this petition to set aside the order to cease and desist issued by the respondent should be granted.

Respectfully submitted,

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APPENDIX A

Analyzing cases set out in Appendix B of Respondent's Brief under the following heading:

HOLDINGS TO THE EFFECT THAT ABANDONMENT OF AN UNFAIR TRADE PRACTICE DOES NOT BAR PROCEEDINGS BY THE FEDERAL TRADE COMMISSION

Abandonment After Complaint

We will not comment on the cases under that heading because we agree that discontinuance of illegal practices after Complaint has been filed would be no defense to the issuance of a Cease and Desist Order.

Abandonment Before Complaint

Most of these cases have been set forth and discussed briefly in our Appendix A to our original brief.

Keasbey & Mattison Co. v. Federal Trade Commission, 159 F.2d 940, 951 (C.A.8, 1947):

This case was referred to on Page 6 of Appendix A to our brief and as noted there, it does not appear how long prior to the filing of the Complaint the illegal agreements had been abandoned.

Deer v. Federal Trade Commission, 152 F.2d 65, 66 (C.A.2, 1945):

This case likewise was referred to on Page 5 of Appendix A and the respondent neglected to complete its quotation with the sentence which is set forth on Page 5 of our Appendix: "We cannot say there was no reason to apprehend its renewal, for the petitioners were *still continuing* the analogous unfair practice of supplying bingo paraphernalia" (Italics supplied).

Moretrench Corp. v. Federal Trade Commission, 127 F.2d 792, 795 (C.A.2, 1942):

This case was not referred to in our Appendix A but we fail to see where it is in point, because the quotation from that case in respondent's brief relates to only one of five mis-statements which had been made and against which mis-statements the Commission had entered a Cease and Desist Order. See 127 F.2d 792, at Page 793, listing the five mis-statements in question.

Hershey Chocolate Corp. v. Federal Trade Commission, 121 F.2d 968, 971 (C.A.3, 1941):

This case was referred to on Page 4 of our Appendix A and we pointed out that the practices had been discontinued "shortly before" the Complaint was issued.

Dr. W. B. Caldwell, Inc., v. Federal Trade Commission, 111 F.2d 889, 891 (C.A.7, 1940):

This case should give no comfort to the respondent because it impliedly recognizes that the evidence in question should not have been admitted, but holds that the admission of improper evidence is not grounds in an administrative proceeding to invalidate the order. In support of the quotation set out by respondent from this case the court cites *United States v. Abilene & So. Ry. Co.,* 265 U.S. 274, 44 S.Ct. 565, 68 L.Ed. 1016. At 265 U.S., Page 288, appears this sentence: "The mere admission by an administrative tribunal of matter which under the rules of evidence applicable to judicial proceedings would be deemed incompetent does

not invalidate its order." The other case cited in support of the proposition in this instant case is that of *Consolidated Edison Co. v. National Labor Relations Board,* 305 U.S. 197, 230, 59 S.Ct. 206, 83 L.Ed. 126. At Page 230 of 305 U.S. appears this statement: " * * * the mere admission of matter which would be deemed incompetent in judicial proceedings would not invalidate the administrative order."

Educators' Association v. Federal Trade Commission, 108 F.2d 470, 473 (C.A.2, 1939):

This case was referred to at Pages 3 and 4 of our Appendix A and as we noted, there does not appear from the facts of the case how long the practices had been discontinued nor under what circumstances.

Federal Trade Commission v. Standard Education Society, 86 F.2d 692, 697 (C.A.2, 1936), *reversed on other grounds* 302 U.S. 112 (1937):

This case likewise was referred to at Page 3 of our Appendix and as we pointed out and as appears from the very quotation in respondent's brief, only "some of the practices" had been discontinued.

Arkansas Wholesale Grocers' Assn. v. Federal Trade Commission, 18 F.2d 866, 871 (C.A.8, 1927), *cert. denied* 275 U.S. 533 (1927):

As we pointed out on Page 2 of our Appendix A, the facts do not disclose how long before the filing of the Complaint the practices in question had been discontinued. Also note the language used by the court: "It is urged that *many* or all of the practices" etc. had been discontinued. (Italics supplied.)

Chamber of Commerce of Minneapolis v. Federal Trade Commission, 13 F.2d 673, 686-687 (C.A. 8, 1926):

This case is referred to on Page 2 of our Appendix A and we, ourselves, failed to point out that the language which was quoted and which is again quoted by the respondent, referred to only one of the objectionable practices, namely, "publications" (see 13 F.2d at 686) but that other objectionable practices were present which apparently were still continuing, such as boycotts, refusal to give market quotations to others, etc.

Moir v. Federal Trade Commission, 12 F.2d 22, 27 (C.A. 1, 1926):

This case was referred to at Pages 1-2 of our Appendix A and as we pointed out the court could not determine from the record whether the practices had been discontinued prior to the filing of the Complaint. The respondent, at Page 11(a) of its brief, gives this quotation from 12 F.2d at Page 27: "In their answer the respondents practically admit that the methods employed * * * constituted unfair methods of competition; but they say that they discontinued these practices early in 1924. * * *"

The court might be interested in the balance of that quotation which respondents neglected to give, especially that part of it which we are italicizing.

> "The only evidence that we find in the record that this was so is that they had discontinued at that time to send out the postal cards upon which the consumer was to indicate his consent to conform to the minimum price established and to cooperate in its maintenance; *but whether this was*

done before the date of the complaint, April 2, 1924, *does not appear.''*

Guarantee Veterinary Co. v. Federal Trade Commission, 285 Fed. 853, 859-860 (C.A.2, 1922):

This case likewise was referred to on Page 1 of our Appendix and as we pointed out and as appears from the quotation in respondents' brief, the discontinuance was "several months before the Complaint was filed."

Sears, Roebuck & Co. v. Federal Trade Commission, 258 Fed. 307, 310 (C.A.7, 1919):

This case was discussed on Page 1 of our Appendix A and we will not repeat what was there said.

APPENDIX B

Analyzing cases set out in Appendix C of Respondent's Brief under the following heading:

SIMILAR HOLDINGS IN CASES ARISING BEFORE OTHER FEDERAL ADMINISTRATIVE AGENCIES

National Labor Relations Board v. Local 74, 181 F.2d 126, 132-133 (C.A.6, 1950):

This case is not in point when the facts are analyzed. The construction of the house which had given rise to the illegal secondary boycott, had been completed, but the employer whose installation of materials with non-union men had caused the union to take their illegal action, was still in business. Furthermore, the discontinuance of the unlawful practice was not voluntary on the part of the union but was due to the fact that the house was completed.

Shore v. Building and Construction Trades Council, 173 F.2d 678, 682 (C.A.3, 1949):

This sentence contained in the quotation set forth by Respondent shows why this case is not in point:

> "The defendants say that they are not legally liable for doing what they did and certainly indicate no lack of intention to do the same thing in the future."

And it further appears from the quotation that the Court considered that the practices had no more than "temporarily ceased."

National Labor Relations Board v. Sewell Mfg. Co., 172 F.2d 459, 461 (C.A.5, 1949):

Not in point because there were *other* violations continuing up to the time of the hearing.

Walling v. Helmerich & Payne, Inc., 323 U.S. 37, 42-43 (1944):

Not in point. Respondents' own quotation shows violation discontinued two months *after* the complaint was filed.

Hecht Co. v. Bowles, 321 U.S. 321, 327 (1944):

That point was not involved in the case. Furthermore, the facts show that violations were continuing.

> "The Company concedes that there will be further violations and contends that it cannot avoid them." *Brown v. Hecht Co.,* 137 F.2d 689, 691.

Walling v. Haile Gold Mines, Inc., 136 F.2d 102, 105 (C.A.4, 1943):

Not in point. Admittedly, a discontinuance after institution of legal proceedings is not a defense.

Pueblo Gas & Fuel Co. v. National Labor Relations Board, 118 F.2d 304, 307 (C.A.10, 1941):

Not in point because tied in with the coercive activity which had been discontinued was a refusal to bargain with the union, which refusal was continued after the NLRB hearing.

National Labor Relations Board v. Penna. Greyhound Lines, 303 U.S. 261, 271 (1938):

Not in point. We are not arguing that an order lawful *when made* becomes moot because of changing circumstances.

Consolidated Edison Co. v. National Labor Relations Board, 305 U.S. 197, 230 (1938):

Not in point because there were other violations still continuing. We agree that if there is illegal activity persisting up to the time of a hearing, to correct it, the person involved may not complain if he is barred from also pursuing other illegal activity which may have been discontinued.